

No. 89-254

Supreme Court, U.  
FILED  
SEP 13 1989

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JAMES A. MARKER, JR. and

BEVERLY J. MARKER,

PETITIONERS,

vs.

WAYNE K. RIESCHEL, DALLAS COUNTY PROSE-  
CUTING ATTORNEY; JERRY COX, DALLAS COUNTY  
SHERIFF; EARNIE BURTIN; MAE BURTIN;

RESPONDENTS.

BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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Zitomer v. Holdsworth, 449 F.2d 724 (3rd

Cir. 1971)

50 U.S.C. app. § 521

50 U.S.C. app. § 525

Sup. Ct. R. 17.1

Sup. Ct. R. 19.3

Sup. Ct. R. 21.4

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CITATIONS TO OPINIONS  
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Marker v. Rieschel, No. 87-3650-CV-S-4,  
(W.D. Mo. May 20, 1988) aff'd  
No. 88-1905 (8th Cir. Jan. 9, 1989)  
(per curiam) and (8th Cir. Apr. 7,  
1989)

**STATUTES AND REGULATIONS**  
**WHICH THE CASE INVOLVES**

**50 U.S.C. app. § 521. Stay of proceedings where military service affects conduct thereof**

At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some other person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his

defense is not materially affected by reason of his military service.

**50 U.S.C. § 525. Statutes of limitations as affected by period of service**

The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right of privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after the date of enactment of the Soldiers' and Sailors'

Civil Relief Act Amendments of 1942 [enacted October 6, 1942] be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax or assessment.

**Sup. Ct. R. 17.1 Considerations governing review on certiorari**

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided



a federal question in a way in conflict with a state court of last resort; or has far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

**Sup. Ct. R. 19.3 Review on certiorari--  
how sought -- parties**

.3. Counsel for the petitioner shall enter an appearance, pay the docket fee, and file, with proof of service as provided by Rule 28, 40 copies of a petition which shall comply in all respects with Rule 21. The case then will be placed on the docket. It shall be the duty of counsel for the petitioner to notify all respondents, on a form supplied by the Clerk, of the date of filing and of the docket number of the case. Such notice shall be served as required by Rule 28.

**Sup. Ct. R. 21.4 The petition for certiorari**

.4. The petition for writ of certiorari shall be as short as possible, but may not exceed 30 pages, excluding the

subject index, table of authorities, any verbatim quotations required by subparagraph 1(f) of this Rule, and the appendix.

**Sup. Ct. R. 22.6 Brief in opposition--reply -- supplemental briefs**

.6. Any party may file a supplemental brief at any time while a petition for writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing. A supplemental brief, restricted to such new matter, may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

**Sup. Ct. R. 28.4(c) Filing and service--special rule for service where constitutionality of Act of Congress or state statute is in issue**

.4(c) In any proceeding in this Court wherein the constitutionality of any statute of a State is drawn in question, and the State or any agency, office, or employee thereof is not a party, the initial pleading, motion, or paper in this Court shall recite that 28 U.S.C. § 2403(b) may be applicable and shall be served upon the Attorney General of the State. In proceedings from any court of the United States as defined by 28 U.S.C. § 451, the initial pleading, motion, or paper shall state whether or not any such court, pursuant to 28 U.S.C. § 2403(b), has certified to the State Attorney General the fact that the constitutionality of such statute of the State was drawn in question.

Mo Rev. Stat. § 56.360. Employment in

**criminal cases prohibited -- civil  
practice authorized**

It shall be unlawful for any prosecuting attorney or circuit attorney, or any assistant prosecuting attorney or any assistant circuit attorney, during the term of office for which he shall have been elected or appointed, to accept employment by any party other than the state of Missouri in any criminal case or proceeding; provided, that nothing in this section shall be deemed to preclude the officers specified in this section from engaging in the civil practice of law. Any violation of the provisions of this section shall be deemed a misdemeanor.

## STATEMENT OF THE CASE

James Allen Marker, Jr., and Beverly Jean Marker, hereinafter referred to as petitioners, filed a Complaint on the 27th day of November, 1987, in the United States District Court, Western District of Missouri, Southern Division, against Wayne K. Rieschel, hereinafter referred to as respondent, and others. In their Complaint, the petitioners alleged numerous civil wrongs arising from a boundary dispute. This boundary line dispute is also the subject of an action in the Circuit Court of Dallas County, Missouri, between petitioners and Earnie and Mae Burtin, named defendants. In petitioners' Complaint filed in the United States District Court, was included a Request For Stay "For The Maximum Period

Of Time," pursuant to 50 U.S.C. app. § 521, a provision of the "Soldiers' And Sailors' Relief Act."

By order of the District Court, on the 9th day of February, 1988, a temporary stay was granted to the 13th day of May, 1988, at which time petitioners were directed to state facts currently existing "which support his position that by reason of his military service, his ability to prosecute this action is materially affected." Petitioner James A. Marker, Jr., responded by letter, requesting the suit be stayed until December 31, 1995. The District Court entered an order and judgment dated the 20th day of May, 1988, dismissing petitioners' Complaint without prejudice [App. p. A-1 - A-4]. The District Court, in its final order, noted such factors in support of its decision,

as: Pendency of the state court action between petitioners and defendants Earnie and Mae Burtin; the protection afforded petitioners by the tolling provisions of 50 U.S.C. app. § 521; the interest of respondents in a prompt resolution of plaintiffs' claims; and the business of the court [App. p. A-5 - A-11].

Petitioners filed a Notice Of Appeal on the 15th day of June, 1988. The United States Court of Appeals for the Eighth Circuit, in its Order of the 7th day of April, 1989, affirmed the decision of the United States District Court for the Western District of Missouri, Southern Division. Petitioners' petition for rehearing and rehearing en banc was denied on the 8th day of March, 1989, the court issuing its mandate on the 17th day of March, 1989. Petitioners also filed a



motion for stay on the 21st day of March, 1989, which was further denied by the United States Court of Appeals on the grounds that because the mandate had been issued, the court had no further jurisdiction [App. p. A-12 - A-13].

Petitioners then applied for an extension of time in which to file a Petition For Writ Of Certiorari in this Court which was granted, allowing filing on or before the 6th day of July, 1989, by Order of Justice Harry A. Blackmun, dated the 30th day of May, 1989. Petitioners again requested an extension of time until the 6th day of August, 1989. Petitioners filed a Petition For Writ Of Certiorari with this Court on or about this date. An additional and amended Petition For Writ Of Certiorari was filed the 15th day of August, 1989.

## SUMMARY OF ARGUMENT

Respondents respectfully request the Court to deny petitioners' Petition For Writ Of Certiorari for several reasons. First, the decision of the United States District Court in which petitioners' Complaint was dismissed without prejudice was a proper application of the protections afforded by the Soldiers' and Sailors' Relief Act. Second, petitioners have attacked the constitutionality of Mo. Rev. Stat. § 56.360, which allows prosecuting attorneys to have private clients. This attack on the constitutionality of a state statute is improperly made since petitioners failed to serve the Attorneys General of the State of Missouri any notice of the pendency of these actions, as required by Sup. Ct. R.

28.4(c). Finally, the form of petitioners' Petition For Writ Of Certiorari is plagued with numerous procedural insufficiencies as was the service of this petition upon respondent and fails to meet the requirements of this Court as set forth in the Supreme Court Rules governing these petitions.

## **ARGUMENT**

Respondents respectfully request the Court to deny petitioners' Petition For Writ Of Certiorari for the reason that the trial court properly disposed of the case by entering a judgment of dismissal without prejudice in order to protect the petitioners' rights pursuant to the Soldiers' and Sailors' Relief Act.

In its Order of the 20th day of May, 1988, the United States District Court for the Western District of Missouri, Southern Division, accepted the facts as set forth in petitioner's letter requesting a stay pursuant to 50 U.S.C. app. § 521, by applying 50 U.S.C. app. § 525, stating:

As pointed out in the Court's order of February 9, 1988, the Missouri statute of limitations is tolled pending Major Marker's military service. It clearly is not in the interest of the

defendants of this case to have it pending beyond the date of December 31, 1995, nor is it in the interest of the business of this Court. This Court seriously doubts that it is in the plaintiffs' interest to postpone the disposition of this case until some time after December 31, 1995. [App. p. A-3 - A-4]

The petitioners filed an appeal in the United States Court of Appeals for the Eighth Circuit requesting this order be reversed. The United States Court of Appeals for the Eighth Circuit affirmed the District Court's Order finding "no abuse of discretion in the District Court's refusal to stay the Markers' cause of action until 1995, particularly considering that the applicable Missouri statute of limitations is tolled during James Marker's military service." [App. p. A-9 - A-10]

50 U.S.C. app. § 525 governs a tolling

of the statute of limitations for those in military service, stating:

The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service . . . whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service . . .

In Ricard v. Birch, 529 F.2d 214, 217 (4th Cir. 1975) the United States Court of Appeals held that "[t]he tolling statute is unconditional. The only critical factor is military service; once that circumstance is shown, the period of limitations is automatically tolled for the duration of the service." In Lester v. United States, 487 F.2d 1033, 1038 (N.D. Tex. 1980), the United States

District Court held that the period of time an individual is engaged in "military service is not to be included in the computing of any period for the bringing of **any** action by or against any person in the military service."

Moreover, the Eighth Circuit Court of Appeals' holding is in accordance with case law interpreting the application of the tolling of the statute of limitations provision of the Soldiers' and Sailors' Relief Act. Zitomer v. Holdsworth, 449 F.2d 724, 726 (3rd Cir. 1971), stands for the proposition that one may not rely on the Soldiers' and Sailors' Relief Act to suspend prosecution of a cause of action indefinitely. Rather, the Zitomer court found that the trial court properly dismissed plaintiff's case for failure to prosecute and did not violate 50 U.S.C.

app. § 525 nor did any other provision of the Act justify allowing plaintiff's case to remain pending for a period of years.

The Eighth Circuit also addressed the underlying property dispute in this case which has given rise to a quiet title action currently pending in the Circuit Court of Dallas County, Missouri. The Eighth Circuit relied on the abstention doctrine, stating:

Principles of abstention are particularly appropriate when state's property rights are involved, Luecke v. Mercantile Bank of Jonesboro, 720 F.2d 15, 16 to 17 (8th Cir. 1983), and as a state action is pending, the state law questions can be resolved without lengthy delay. Edwards v. Arkansas Power & Light Co., 683 F.2d 1149, 1157 (8th Cir. 1982). [App. p. A-10]

Petitioners have failed to show any justification under Sup. Ct. R. 17.1 for this matter to be reviewed by this Court. The Eighth Circuit has not rendered a



decision in conflict with any other federal court of appeals, a state court of last resort has not decided a federal question in conflict with that of another state court of last resort, nor have petitioners shown that this is an important question of federal law which has never been decided by this court or that it conflicts with other applicable decisions of this court.

The United States District Court for the Western District of Missouri, Southern Division, as well as the United States Court of Appeals for the Eighth Circuit, correctly and accurately applied the Soldiers' and Sailors' Relief Act by holding that any cause of action asserted by Major Marker was tolled until he completed his military service. The interests of both petitioners and

respondents were carefully considered by the court as evidenced by their opinions. The District Court did not prejudice any rights of Major Marker by dismissing his cause of action without prejudice. Petitioners are free to refile their case upon the close of Major Marker's military service.

For the foregoing reasons, respondent asks the Court to find there was no abuse of discretion on the part of the District Court in applying the Soldiers' and Sailors' relief act, nor on the part of the Eighth Circuit of Appeals in upholding the District Court's decision.

Respondent respectfully requests this Court to deny petitioners' request for review of the constitutionality of Mo. Rev. Stat. § 56.360 for the reason that petitioners have wholly failed to give

proper notice to the Missouri Attorney General as required by Sup. Ct. R.

28.4(c), which states:

In any proceeding in this court wherein the constitutionality of any statute of the state is drawn in question, and the state or agency, officer or employee thereof is not a party, the initial pleading, motion, or paper of this Court shall recite that 28 U.S.C. §2403(b) may be applicable and shall be served upon the Attorney General of the State.

Petitioners have failed to notify the Attorney General of the State of Missouri that they are challenging the constitutionality of the aforementioned statute which allows prosecutors to participate in private practice and retain private clients concurrently while discharging their prosecutorial duties. For this reason, respondent requests that petitioners' request for review of the

constitutionality of this Missouri statute be denied.

Petitioners have wholly failed to follow several other procedural dictates of the Supreme Court Rules. Sup. Ct. R. 21.4 specifically states that the petition for writ of certiorari may not exceed 30 pages. Petitioners' Petition For Writ Of Certiorari is approximately 50 pages in length.

Furthermore, petitioners initially filed a Petition For Writ Of Certiorari on or about the 6th day of August, 1989, and subsequently filed a revised version of this Petition For Writ Of Certiorari on the 15th day of August, 1989. Sup. Ct. R. 22.6 states that a supplemental brief filed by a party to call attention to a new matter unavailable at the time of the last filing, be "restricted to such new

matter, [and] may not exceed 10 pages." Petitioners did not in any way identify their subsequently filed brief as an amended brief or a supplemental brief.

Additionally, Sup. Ct. R. 19.3 requires petitioner file a proof of service of a petition for writ of certiorari and that such notice should be served pursuant to Sup. Ct. R. 28. There was no certificate whatsoever accompanying petitioners' brief when received by respondent, nor was the Petition dated in any manner to identify its date of filing. Respondent is aware that petitioners have filed their Petition For Writ Of Certiorari pro se, but the combined effect of the numerous procedural errors and problems contained in and surrounding the filing of said brief are blatantly in error under the Supreme Court Rules.

For these reasons, respondent respectfully requests that petitioners' Petition For Writ Of Certiorari be denied.

## CONCLUSION

Respondent requests that this Court carefully review the Petition For Writ Of Certiorari filed by petitioners and deny the same on the basis that the District Court and the Eighth Circuit Court of Appeals properly held that the Soldiers' and Sailors' Relief Act tolled any statute of limitations governing Major Marker's cause of action, and that to properly protect the interests of all parties the matter should be dismissed without prejudice rather than allow same to remain pending indefinitely on the docket of the court.

Furthermore, the Petition For Writ Of Certiorari filed by petitioners should be denied based on serious and highly prejudicial procedural problems contained

in and surrounding the filing of their Petition. The constitutionality of a state statute is being challenged, yet the Attorney General of the State of Missouri has been afforded no notice of this challenge whatsoever. In addition, there are irregularities regarding length, filing of additional or supplemental petitions without identifying such, and the lack of certificate of service or dating of their Petition in a manner to afford respondent notice of the date upon which the response time should run.

Respectfully submitted,  
SCHROFF, GLASS & NEWBERRY, P.C.

By

  
John G. Newberry

Missouri Bar No. 27300

Attorney of Record for

Wayne K. Rieschel, Respondent



**APPENDIX**



IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MISSOURI  
SOUTHERN DIVISION

JAMES ALLEN MARKER, JR., et al.,

Plaintiffs,

vs.

WAYNE K. RIESCHEL, et al.,

Defendants.

ORDER

On February 9, 1988, the Court entered an order staying any action in the above-captioned case through May 13, 1988 on the basis that one of the plaintiffs James A. Marker, Jr. was in the military service. The Court directed Major Marker to file a report in writing advising this Court of any facts existing at the time which would materially affect his ability to prosecute his action on or before May 6, 1988. Under date of May 5, 1988, the Clerk

received a nine and one-half page single spaced typewritten report from Mr. Marker. In conclusion he indicated that he felt his military service would prevent him from prosecuting this action until his release from same and requested a stay until December 31, 1995. Major Marker did not indicate any efforts which he had made to obtain a leave or other dispensation from the military authorities which would give him an opportunity to prosecute this action.

The Court is aware that there is a quiet title action pending between Major Marker's wife Beverly Jean Marker and Earnie and May Burtin. In short, the underlying dispute in this case is over a property boundary line and the state court action seeks to resolve that issue.

Disposition of this issue is neither

complex nor would it take an extended period of time in which to try the issues involved and dispose of that case.

The Court will accept the facts as set forth in Major Marker's letter dated April 29, 1988 and filed in this case on May 5, 1988 relative to the interference of his military service in effectively prosecuting this case. However, as pointed out in the Court's order of February 9, 1988 the Missouri statute of limitations is tolled pending Major Marker's military service. It certainly is not in the interests of the defendants in this case to have it pending beyond the date of December 31, 1995 nor is it in the interest of the business of this Court. This Court seriously doubts that it is in the plaintiffs' interest to postpone the

disposition of this case until sometime after December 31, 1995.

It is the opinion of this Court that it would be in the interests of justice and in the best interests of all parties concerned for the case to be dismissed without prejudice to a refiling by plaintiffs. Therefore, it is

ORDERED that the Clerk is directed to enter a judgment of dismissal without prejudice.

/s/ Russell G. Clark

Russell G. Clark, District Judge

United States District Court

Dated: May 20, 1988

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT  
No. 88-1905

Appeal from the United States  
District Court for the  
Western District of Missouri

James Allen Marker, Jr., and  
Beverly Jean Marker,

Appellants,

v.

Wayne K. Rieschel, Dallas County  
Prosecuting Attorney; Jerry Cox, Dallas  
County Sheriff; Earnie Burtin; Mae Burtin,  
Appellees.

Submitted: December 22, 1988

Filed: January 9, 1989

Before McMILLIAN, JOHN R. GIBSON, and  
MAGILL, Circuit Judges.

EIGHTH CIRCUIT PER CURIAM

A-5

PER CURIAM.

James and Beverly Marker appeal pro se from the district court order dismissing their complaint without prejudice. We affirm.

The Markers filed this diversity suit on November 27, 1987, alleging various constitutional violations arising out of a boundary-line dispute with their neighbors, Earnie and Mae Burtin. Named as defendants in their complaint were Wayne Rieschel (the county prosecuting attorney), Jerry Cox (the county sheriff), and the Burtins. Included in the complaint was a request for a stay pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. § 521, until the year 1995, when James Marker completes his military service, and a request for an injunction of a pending



state court action involving the same property dispute.

On February 9, 1988, the district court granted the Markers a temporary stay until May 13, 1988, and directed them to advise the court of any facts which materially affected their ability to prosecute their case. The Markers responded that James Marker's military service interfered with his effective prosecution of the case, and requested the court to stay the cause of action until 1995.

The district court dismissed the Markers's complaint without prejudice, finding there were no facts to support a stay. In reaching this result, the court noted that the underlying property boundary dispute was pending in state court, and that the issue was not complex

nor would it take an extended period of time to resolve. In addition, the court noted that the Missouri statute of limitations governing the Markers' cause of action tolled during James Marker's military service, and that it was not in the interests of the defendants, the Markers, or of the court to have the case pending until 1995. This appeal followed.

Title 50 U.S.C. § 521 provides that the court in which an action is pending has the discretion to stay the proceedings if the ability of the plaintiff to prosecute the action is "materially affected by reason of his military service." The stay provision is not mandatory and the court has the ultimate discretion in determining, from all the circumstances of the case, whether a stay is warranted. Boone v. Lightner, 319 U.S.

561, 564-65 (1943); Tabor v. Miller, 389 F.2d 645, 647 (3d Cir.), cert. denied, 391 U.S. 915 (1968). The stay provision applies only to persons in military service. Growder v. Capital Greyhound Lines, 169 F.2d 674, 675 (D.C. Cir. 1948).

Title 50 U.S.C. § 535 mandates that the statute of limitations governing a suit in which a serviceman is a party be tolled during that person's military service. Bickford v. United States, 656 F.2d 636, 640 (Ct. Cl. 1981). Spouses of servicemen are not entitled to the benefits of the tolling provision of this section. Lester v. United States, 487 F. Supp. 1933, 1039 (N.D. Tex. 1980).

We find no abuse of discretion in the district court's refusal to stay the Markers' cause of action until 1995, particularly considering that the

applicable Missouri statute of limitations is tolled during James Marker's military service. Although the Markers correctly note that Mrs. Marker does not receive the benefits of the tolling section, she also is not entitled to a stay.

Furthermore, as noted by the district court, there is currently a quiet-title action pending in the state court which addresses the underlying property dispute in this case. Principles of abstention are particularly appropriate when state's property rights are involved, Luecke v. Mercantile Bank of Jonesboro, 720 F.2d 15, 16-17 (8th Cir. 1983), and as a state action is pending, the state law questions can be resolved without lengthy delay. Edwards v. Arkansas Power & Light Co., 683 F.2d 1149, 1157 (8th Cir. 1982).

We have considered the Markers' remaining points of error and find them to be without merit.

Accordingly, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH  
CIRCUIT.

[Do not publish.]

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

No. 88-1905

Appeal from the United States  
District Court for the  
Western District of Missouri

James Allen Marker, Jr., and  
Beverly Jean Marker,

Appellants,

v.

Wayne K. Rieschel, Dallas County  
Prosecuting Attorney; Jerry Cox, Dallas  
County Sheriff; Earnie Burtin; Mae Burtin,

Appellees.

Filed: April 7, 1989

ORDER

A petition for rehearing and rehearing  
en banc was denied March 8, 1989, and the

mandate of this court issued March 17, 1989. Since that time appellants have filed a motion for stay on March 21, 1989. As the mandate has issued, this court has no further jurisdiction in this case. Appellants are notified that further filings may result in imposition of sanctions.

A true copy.

Attest:

/s/ Robert D. St. Vrain

CLERK, U. S. COURT OF APPEALS, 8TH CIRCUIT